IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1236 OF 2007

Ali Asgar @ Salim Bootwala ..Petitioner

Vs.

Leena Bootwala and ors. ..Respondents

Ms. Deepa Chavan with Ms. Kirti Dabir for petitioner.
Ms. Shaheen Khan Naqshbandi for respondent no.1.
Ms. S.V. Gajare, APP for State.

CORAM: B.H. MARLAPALLE, J.

Date : July 26, 2007.

P.C.:

1. Heard Ms. Chavan the learned counsel for the petitioner-husband and Ms. Naqshbandi the learned counsel for the respondent no.1-wife. The respondent nos.2 and 3 are not the necessary parties and they be deleted forthwith. The learned APP appears for the State.

2. Rule. Respondents waive service.

3. The petitioner-husband is aggrieved by the order dated 20/4/2007 passed by the learned

Metropolitan Magistrate, 17th Court, Mazgaon, Mumbai directing him to pay the interim maintenance of Rs.10,000/- per month to the applicant-wife, Rs.10,000/- for her son who would be becoming major on 16/5/2008 and an amount of Rs.10,000/- towards rent for the accommodation. Criminal Appeal No.85 of 2007 challenging the order dated 20/4/2002 came to be dismissed by the Sessions Court.

4. On or about 8/3/2007 the respondent no.1-wife filed an application under the Protection of Women from Domestic Violence Act, 2005 (for short the Act) against the present petitioner claiming it to be an application under Sections 9(b) and 37 (2)(c) of the said Act. It came to be registered as Criminal Case No. 28/N/2007 and in the said application, an interlocutory application came to be filed praying for maintenance under Section 12 of the Act. The respondent no.1 claimed that she was the wife of the petitioner and there was a subsistence matrimonial relationship between them. Out of the wedlock they have two children. They were married on 1/2/1988 under the Special Marriage Act, 1954 and the marriage

was registered on 9/3/1988. She claimed that the husband was physically abusing her, harassing and torturing her and she along with two children was thrown out of the house on or about 3/8/2006. She claimed that both of them were living together under the same roof and as husband and wife.

5. The husband filed his reply to the application for maintenance and opposed the same. He admitted that the marriage had taken place on 1/2/1988 and it was registered under the Special Marriage Act, 1954 and was solemnised as per Dawoodi Bohari Muslim Rites on 9/3/1988. He also admitted that out of the wedlock there are two children, daughter Raisa aged 18 years and son Mazahir aged 17 years. However, he pointed out that both of them had jointly filed a petition bearing No.A-335/97 under Section 28 of the Special Marriage Act, 1954 in the Family Court at Mumbai seeking a decree of divorce by consent and on 9th October, 1997 the marriage was dissolved and a decree of divorce by consent was granted by the Family Court. He further pointed out that in July 2006 the respondent no.1-wife had filed Petition No.A-1300/06

in the Family Court for dissolution of marriage under the Dissolution of Muslim Marriages Act by suppressing the decree of divorce granted on 9th October, 1997. When this was pointed out to the Family Court, the petition came to be rejected as withdrawn by the order dated 24/8/2006. He, therefore, disputed the maintainability of the application filed by the wife and registered as CC No.28/N/2007 as well as the application filed under Section 12 of the Act for the maintenance. The husband also raised the issue of the applicability of the Act to the incident of 3/8/2006 on the ground that the Act has been brought into force from 26th October, 2006.

6. The learned counsel for the respondent no.1-wife submitted that the wife was driven out of the house prior to filing the proceedings before the learned Magistrate under the Act and, therefore, there was continuous cause of action even as on 26/10/2006 i.e. on the date the Act was brought into force by the Government of India. She has supported the impugned order passed by the learned Magistrate. She also submitted that the decree of divorce granted on

9/10/1997 was by way of fraud and ex parte and the wife has taken steps for setting aside the said decree recently. She also submitted that against the order passed in Petition No.A-1300 of 2006 an appeal has been filed.

7. In para 7 of the impugned order the learned Magistrate stated that, admittedly, the applicant i.e. the respondent-wife along with her children was residing with the petitioner in a common residence. Whereas, the husband in his reply clearly pointed out that after the decree of divorce was passed by consent on 9/10/1997 and even prior to that they were staying separately and when he lost his father in 2002 due to his old age, as and when the husband was out of station on foreign tours, the wife was permitted to come and stay with the children in his father’s house and he clearly denied the allegation that the respondent-wife was staying with him under the same roof and there was any matrimonial relationship or even the domestic relationship as defined under Section 2(f) of the Act was existing between the parties either on 3/8/2006 or on the date the

application was filed before the learned Magistrate. Ms. Chavan the learned counsel for the petitioner has placed on record a certified true copy of the order passed by the Family Court on 9/10/1997 granting the decree of dissolution of the marriage by consent under Section 28 of the Special Marriage Act, 1954. In the said order it is clearly stated that after the parties were married on 1/2/1988 they live together for about 7 years and they begot two children from the wedlock. However, since 1995 onwards the husband and wife were staying separately and they continued to stay separately till the decree of divorce by consent was granted. The order further states,

> "...The parties are living apart, and that they are pursuing further for divorce even today. They have stated that they have no claim against each other of whatsoever nature...."

8. In Petition No. A-1300 of 2006 when the order was passed on 24/8/2006 the learned Judge of the Family Court again referred to the decree of divorce

by consent and dissolution of marriage under Section 28 of the Special Marriage Act, 1954 passed on 9/10/1997 and clearly noted that the same was suppressed and the applicant-wife was required to be saddled with heavy costs. On account of these strong observations made by the learned Judge, it appears that the wife preferred to withdraw the petition.

9. The learned counsel for the respondent-wife also referred to some application made by the respective parties to the police station and some admission that the wife was staying in the husband's house. So long as the decree of divorce granted on 9/10/1997 subsists, whether the legally separated spouses were staying together or not is a matter which requires to be gone into by adducing evidence. Even if the wife claims that there was a domestic relationship with the petitioner all along, such a contention cannot be accepted prima facie and it will have to be proved by leading evidence. When the husband very clearly brought before the court about the decree of divorce passed way back in October, 1997, it was necessary for the learned Magistrate to

first decide the issue of applicability of the Act to the parties and it was not permissible for him to entertain an application under Section 12 of the Act more so when in the decree of divorce it is clearly stipulated that the spouses declared that there was no claim against each other of whatsoever nature. The issue of applicability of the Act will also get resolved once the parties adduce evidence. Both the children, who are grown up - daughter is in the 2nd year of B.A. and son is in the 12th standard, will certainly be the two witnesses to depose before the learned Magistrate and in deed they may be better catalysts to bring about a settlement between their parents.

10. It is, therefore, directed that the issue of the applicability of the Act and whether the parties were living in a domestic relationship, irrespective of the order passed by the learned Additional Sessions Judge on 6/6/2007 dismissing the appeal i.e. Cri. Appeal No. 85 of 2007 filed by the petitioner, be decided by calling upon the parties to lead evidence, both oral and documentary and it should be done as

expeditiously as possible and in any case within a period of two months from the receipt of this order. The learned Magistrate will also decide the issue whether such a domestic relationship existed as on 3/8/2006 on the basis of the evidence that the parties may adduce. Till these preliminary issues are decided, the application filed under Section 12 of the Act cannot be adjudicated upon and, therefore, the impugned order is unsustainable. The claim of the respondent-wife for maintenance cannot be entertained unless the preliminary issue as noted earlier is decided in her favour.

11. On the maintenance to be paid to the children, including the rental charges for their accommodation, stand over to 4-8-2007. The children and spouses to remain present before the court on the next date.

(B.H. Marlapalle,J.)

Dated: 4/8/2007

12. On the issue of maintenance to the children as placed before me on 30/7/2007 by the learned counsel for the parties and the assurance given by the petitioner-father that he would be most willing to do all that is required to be done for their welfare and education, I have gone through the expenditure incurred by the respondent no.1-wife on the payment payment of tuition fees, purchase of books and this comes to around Rs.1,46,000/-. Both the children are grown-up and they are college students. I had talked to them at length to understand their lifestyle and they have assured me that the financial provision made by their father would not be misused and each one of them would limit their monthly expenses to about Rs.7000/- to Rs.8000/-. Both of them have also assured me that the bank accounts opened by the father would be operated with responsibility and would limit the expenditure to about Rs.7000/- to Rs.8000/- per month. In addition, the father will have to reimburse separately for any further fees for any specialised courses or tuition fees as the case may be. The father will also buy one laptop immediately which

could be used by both the children for the time being. The laptop will be provided within two weeks from today. The cheque books of the respective accounts which could be operated by the children separately and on their own will be handed over to them immediately. The children have also assured me that they would not keep a distance from their father and will also try to meet him subject to his response by way of his love and affection. The cheque of Rs.1,46,000/- will be issued by the petitioner-father in the name of respondent no.1-wife within two weeks from today. I have also noted down the offer made by the petitioner for the children to come and stay with him at any time.

13. In the premises this petition is allowed partly and the impugned order is hereby quashed and set aside. The application filed under Section 12 of the Act by the respondent-wife is hereby restored to the file of the trial court in C.C. No.28/N/2007. If the preliminary point regarding the domestic relationship is decided in favour of the respondent-wife, the said application shall be heard

afresh regarding the claim of the wife for maintenance. The distress warrant dated 23/7/2007 issued against the petitioner-husband also stands set aside. Rule made absolute accordingly.

14. Writ to go to the trial court forthwith. Certified copy is expedited.

(B.H. Marlapalle,J.)